Supreme Court, U.S.
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No. 02-691

IN THE
Supreme Court of the United States

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Mark Pickelman and Raymond Snarski,

Petitioners

v.

Michigan State Police and Col. Michael D. Robinson, in his official capacity

Respondents.

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On Petition For Writ of Certiorari
To the Sixth Circuit United States Court of Appeals

# PETITION FOR WRIT OF CERTIORARI

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60 pp

## QUESTION PRESENTED FOR REVIEW

I. Whether the Department of Transportation's classification regulations for hazardous materials, including dangerous explosives, preempt Michigan's archaic classification scheme for fireworks, which is, admittedly, completely inconsistent with the federal scheme, where Congress specifically stated that all state laws "about" classifications of hazardous materials are preempted unless "substantively the same" as the federal classifications?

## CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company involved in this matter, as a party or otherwise connected to a party. Therefore, no parent or publicly held company owns 10% or more of any corporation's stock.

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## CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The Court of Appeals decision herein was not recommended for publication. However, it can be found at Pickelman v. Michigan State Police, 31 Fed. Appx. 298, 2002 U.S. App. LEXIS 5170 (6th Cir. 2002).

## JURISDICTION

The statutory provision which provides the Court with jurisdiction to grant a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals is 28 U.S.C. § 1254.

The judgment of the Court of Appeals was entered on March 22, 2002. An order granting an extension of time to file a motion for rehearing was entered on April 5, 2002. It allowed the appellant to file the motion on or before April 19, 2002. The motion for rehearing and rehearing en banc was filed on April 19, 2002. Pursuant to Application No. 02A170, an extension of time to file this petition was granted on August 28, 2002. The time was extended to and including November 2, 2002, by Justice Stevens.

Appellate jurisdiction in the 6th Circuit was based on the timely Notice of Appeal, filed July 21, 2000. The appeal was from the trial court's June 30, 2000, Memorandum Opinion and Order Dismissing Civil Action. The appeal was from a final order pursuant to 28 U.S.C. §1291. The appeal was timely pursuant to F.R.A.P. 4.

Jurisdiction in the District Court was based on federal questions, 28 U.S.C. §1331, *inter alia,* the Supremacy Clause and the preemptive effect of 49

U.S.C. §5125.. The case was filed pursuant to the Declaratory Judgment Act, 28 U.S.C. §2201 and §2202.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Supremacy Clause, Art. VI, cl.2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

49 U.S.C. §5125.

Preemption

(a) General. - Except as provided in subsections (b), (c), and (e) of this section and unless authorized by another law of the United States, a requirement of a State, political subdivision of a State, or Indian tribe is preempted if -

(1) complying with a requirement of the State, political subdivision, or tribe and a requirement of this chapter or a regulation prescribed under this chapter is not possible; or

(2) the requirement of the State, political subdivision, or tribe, as applied or enforced, is an obstacle to accomplishing and carrying out this chapter or a regulation prescribed under this chapter.

(b) Substantive Differences. - (1) Except as provided in subsection (c) of this section and unless authorized by another law of the United States, a law, regulation, order, or other requirement of a State, political subdivision of a State, or Indian tribe about any of the following subjects, that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter, is preempted:

(A) the designation, description, and classification of hazardous material.

(B) the packing, repacking, handling, labeling, marking, and placarding of hazardous material.

(C) the preparation, execution, and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents.

(D) the written notification, recording, and reporting of the unintentional release in transportation of hazardous material.

(E) the design, manufacturing, fabricating, marking, maintenance, reconditioning, repairing, or testing of a packaging or a container represented, marked, certified, or sold as qualified for use in transporting hazardous material.

(2) If the Secretary of Transportation prescribes or has prescribed under section 5103(b), 5104, 5110, or 5112 of this title or prior comparable provision of law a regulation or standard related to a subject referred to in paragraph (1) of this subsection, a State, political subdivision of a State, or Indian tribe may prescribe, issue, maintain, and enforce only a law, regulation, standard, or order about the subject that is substantively the same as a provision of this chapter or

a regulation prescribed or order issued under this chapter. The Secretary shall decide on and publish in the Federal Register the effective date of section 5103(b) of this title for any regulation or standard about any of those subjects that the Secretary prescribes after November 16, 1990. However, the effective date may not be earlier than 90 days after the Secretary prescribes the regulation or standard nor later than the last day of the 2-year period beginning on the date the Secretary prescribes the regulation or standard.

(3) If a State, political subdivision of a State, or Indian tribe imposes a fine or penalty the Secretary decides is appropriate for a violation related to a subject referred to in paragraph (1) of this subsection, an additional fine or penalty may not be imposed by any other authority.

(c) Compliance With Section 5112(b) Regulations. - (1) Except as provided in paragraph (2) of this subsection, after the last day of the 2-year period beginning on the date a regulation is prescribed under section 5112(b) of this title, a State or Indian tribe may establish, maintain, or enforce a highway routing designation over which hazardous material may or may not be transported by motor vehicles, or a limitation or requirement related to highway routing, only if the designation, limitation, or requirement complies with section 5112(b).

(2)(A) A highway routing designation, limitation, or requirement established before the date a regulation is prescribed under section 5112(b) of this title does not have to comply with section 5112(b)(1)(B), (C), and (F).

(B) This subsection and section 5112 of this title do not require a State or Indian tribe to comply with

section 5112(b)(1)(I) if the highway routing designation, limitation, or requirement was established before November 16, 1990.

(C) The Secretary may allow a highway routing designation, limitation, or requirement to continue in effect until a dispute related to the designation, limitation, or requirement is resolved under section 5112(d) of this title.

(d) Decisions on Preemption. - (1) A person (including a State, political subdivision of a State, or Indian tribe) directly affected by a requirement of a State, political subdivision, or tribe may apply to the Secretary, as provided by regulations prescribed by the Secretary, for a decision on whether the requirement is preempted by subsection (a), (b)(1), or (c) of this section. The Secretary shall publish notice of the application in the Federal Register. The Secretary shall issue a decision on an application for a determination within 180 days after the date of the publication of the notice of having received such application, or the Secretary shall publish a statement in the Federal Register of the reason why the Secretary's decision on the application is delayed, along with an estimate of the additional time necessary before the decision is made. After notice is published, an applicant may not seek judicial relief on the same or substantially the same issue until the Secretary takes final action on the application or until 180 days after the application is filed, whichever occurs first.

(2) After consulting with States, political subdivisions of States, and Indian tribes, the Secretary shall prescribe regulations for carrying out paragraph (1) of this subsection.

(3) Subsection (a) of this section does not prevent a State, political subdivision of a State, or Indian tribe, or another person directly affected by a requirement, from seeking a decision on preemption from a court of competent jurisdiction instead of applying to the Secretary under paragraph (1) of this subsection.

(e) Waiver of Preemption. - A State, political subdivision of a State, or Indian tribe may apply to the Secretary for a waiver of preemption of a requirement the State, political subdivision, or tribe acknowledges is preempted by subsection (a), (b)(1), or (c) of this section. Under a procedure the Secretary prescribes by regulation, the Secretary may waive preemption on deciding the requirement -

(1) provides the public at least as much protection as do requirements of this chapter and regulations prescribed under this chapter; and

(2) is not an unreasonable burden on commerce.

(f) Judicial Review. - A party to a proceeding under subsection (d) or (e) of this section may bring a civil action in an appropriate district court of the United States for judicial review of the decision of the Secretary not later than 60 days after the decision becomes final.

(g) Fees. - (1) A State, political subdivision of a State, or Indian tribe may impose a fee related to transporting hazardous material only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response.

(2) A State or political subdivision thereof or Indian tribe that levies a fee in connection with the transportation of hazardous materials shall, upon the Secretary's request, report to the Secretary on -

(A) the basis on which the fee is levied upon persons involved in such transportation;

(B) the purposes for which the revenues from the fee are used;

(C) the annual total amount of the revenues collected from the fee; and

(D) such other matters as the Secretary requests.

M.C.L. 750.243a Definitions; prohibited sales and conduct; fireworks for which permit not required

(1) As used in this chapter:

(a) "Fireworks" means a device made from explosive or flammable compositions used primarily for the purpose of producing a visible display or audible effect, or both, by combustion, deflagration, or detonation. Fireworks includes class B fireworks and class C fireworks.

(b) "Class B fireworks" means toy torpedoes, railway torpedoes, firecrackers or salutes that do not qualify as class C fireworks, exhibition display pieces, aeroplane flares, illuminating projectiles, incendiary projectiles, incendiary grenades, smoke projectiles or bombs containing expelling charges but without bursting charges, flash powders in inner units not exceeding 2 ounces each, flash sheets in interior packages, flash powder or spreader cartridges containing not more than 72 grains of flash powder each, and other similar devices.

(c) "Class C fireworks" means toy smoke devices, toy caps containing not more than .25 grains of explosive

mixture, toy propellant devices, cigarette loads, trick matches, trick noise makers, smoke candles, smoke pots, smoke grenades, smoke signals, hand signal devices, Very signal cartridges, sparklers, explosive auto alarms, and other similar devices.

(2) Except as provided in subsection (3) and sections 243b, 243c, and 243d, a person, firm, partnership, or corporation shall not offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, possess, give, furnish, transport, use, explode, or cause to explode any of the following:

(a) A blank cartridge, blank cartridge pistol, toy cannon, toy cane, or toy gun in which explosives are used.

(b) An unmanned balloon which requires fire underneath to propel it and is not moored to the ground while aloft.

(c) Firecrackers, torpedoes, skyrockets, roman candles, daygo bombs, bottle rockets, whistling chasers, rockets on sticks, or other fireworks of like construction.

(d) Fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chlorates, oxalates, sulphides of lead, barium, antimony, arsenic, mercury, nitroglycerine phosphorus, or a compound containing these or other modern explosives.

(3) A permit is not required for the following:

(a) Flat paper caps containing not more than .25 of a grain of explosive content per cap, in packages labeled to indicate the maximum explosive content per cap.

(b) Toy pistols, toy cannons, toy canes, toy trick noise makers, and toy guns of a type approved by the director of the department of state police in which paper caps as described in subdivision (a) are used and which are so constructed that the hand cannot come in contact with the cap when in place for the explosion and which are not designed to break apart or be separated so as to form a missile by the explosion.

(c) Sparklers containing not more than .0125 pounds of burning portion per sparkler.

(d) Flitter sparklers in paper tubes not exceeding 1/8 inch in diameter, cone fountains, and cylinder fountains.

(e) Toy snakes not containing mercury, if packed in cardboard boxes with not more than 12 pieces per box for retail sale and if the manufacturer's name and the quantity contained in each box are printed on the box; and toy smoke devices.

(f) Possession, transportation, sale, or use of signal flares of a type approved by the director of the department of state police, blank cartridges or blank cartridge pistols specifically for a show or theater, for the training or exhibiting of dogs, for signal purposes in

athletic sports, for use by military organizations, and all items described in subsection (2) used by railroads for emergency signal purposes.

(g) The sale of fireworks, provided they are to be shipped directly out of state pursuant to regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water.

49 C.F.R. 173.50

(a) Explosive. For the purpose of this subchapter, an explosive means any substance or article, including a device, which is designed to function by explosion (i.e., an extremely rapid release of gas and heat) or which, by chemical reaction within itself, is able to function in a similar manner even if not designed to function by explosion, unless the substance or article is otherwise classed under the provision of this subchapter.

(b) Explosives in Class 1 are divided into six divisions as follows:

(1) Division 1.1 consists of explosives that have a mass explosion hazard. A mass explosion is one which affects almost the entire load instantaneously.

(2) Division 1.2 consists of explosives that have a projection hazard but not a mass explosion hazard.

(3) Division 1.3 consists of explosives that have a fire hazard and either a minor blast hazard or a minor projection hazard or both, but not a mass explosion hazard.

(4) Division 1.4 consists of explosives that present a minor explosion hazard. The explosive effects are

largely confined to the package and no projection of fragments of appreciable size or range is to be expected. An external fire must not cause virtually instantaneous explosion of almost the entire contents of the package.

(5) Division 1.5 \1\ consists of very insensitive explosives. This division is comprised of substances which have a mass explosion hazard but are so insensitive that there is very little probability of initiation or of transition from burning to detonation under normal conditions of transport.

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\1\ The probability of transition from burning to detonation is greater when large quantities are transported in a vessel.

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(6) Division 1.6 \2\ consists of extremely insensitive articles which do not have a mass explosive hazard. This division is comprised of articles which contain only extremely insensitive detonating substances and which demonstrate a negligible probability of accidental initiation or propogation.

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\2\ The risk from articles of Division 1.6 is limited to the explosion of a single article.

## STATEMENT OF THE CASE

The Petitioners seeks relief from the judgment of the Court of Appeals for the Sixth Circuit which affirmed the order, dismissing the civil action herein, of the District Court of the Eastern District of Michigan.

The Petitioners sought an order declaring the fireworks classification system under Michigan's penal code preempted by the classification regulations promulgated by the Department of Transportation. Congress specifically requires the preemption of any state's law which "concerns" or is "about" the classification of hazardous materials if the classifications are not "substantively similar" to federal regulations. 49 U.S.C. §5125(b)(A); 49 C.F.R. 107.202(a)(1).

Michigan utilizes various imprecise descriptions such as "sparklers", "daygo bombs" and "smoke grenades" to attempt to place all fireworks in one of three categories, Classes A, B & C. M.C.L. 750.243a. The descriptions were first utilized by the State of Michigan in the earlier part of last century. The descriptions have not been modified in any significant manner since then.

The Department of Transportation regulations utilize six (6) categories for explosives, including fireworks. 49 C.F.R. 173.50. The regulations were promulgated pursuant to the Hazardous Materials Transportation Act. The purposes of the act was two-fold: (a) to protect the public against the risks involved with "all forms of hazardous material transportation," and (b) "to preclude a multiplicity of State and local regulations and the potential for varying as will as

conflicting regulations." Senate Report No. 101-449, Hazardous Materials Transportation Uniform Safety Act of 1990, p. 2.

The DOT regulations are based on the potential hazard involved with the transportation and storage of any give type of hazardous materials. The Michigan classifications are arcane, do not allow classification of many types of fireworks, are not functionally based on any potential hazard of a given item and have ***no consistency whatsoever with the federal regulations.***

## REASONS FOR GRANTING THE WRIT

The need for uniformity and safety in the transportation of hazardous materials is of paramount importance since the events of 9-11-01 and the Oklahoma bombings. Guidance on the preemptive effect of federal law concerning the handling of hazardous materials is important to all courts across the country.

## Statement of Facts

Plaintiffs, each of them a fireworks dealer in Michigan, filed a Complaint for Declaratory Relief on March 2, 2000, against the Michigan State Police (MSP) asserting, *inter alia,* that the Michigan classification scheme for fireworks is preempted by the DOT regulations for classification of hazardous materials. The basic factual circumstances of each Plaintiff's activity in interstate commerce are as follows.

### *Pickelman*

Plaintiff Mark Pickelman in the owner of certain permanent business in Newberry, Michigan and has operated a seasonal fireworks business there since 1967. His method of operation for over 30 years has been to sell all categories of U.S. DOT-approved consumer fireworks. He has always stocked and sold items provided that the items are shipped out-of-state in accordance with DOT regulations.

The state of Michigan specifically approves of the shipment of fireworks "out-of-state in accordance

with DOT regulations." M.C.L. 750.243a(3)(g). However, in 1998, the MSP, contrary to prior practice, decided that the shipments had to be by a "common carrier." The DOT regulations do not require this. 49 C.F.R. 172.504(c)(1). The MSP has seized all Pickelman's fireworks relying on allegations of illegality pursuant to the classification scheme of M.C.L. 243a. Pursuant to the policy of the MSP, his commercial stock was destroyed without judicial process.

### *Snarski*

Plaintiff Snarski is a businessman in Macomb County, Michigan, who was stopped by the MSP Motor Carrier Division and other MSP in Monroe County, Michigan on June 24, 1998, while he was a passenger in a rented vehicle after purchasing fireworks from a wholesaler in Ohio. The placard and had bill of lading indicated that the fireworks are classified as U.S. DOT Division 1.4G. The manner of transportation was in accordance with DOT regulations.

Not believing that their rented truck was large enough to be required to pass over the scales on I-75 north of Toledo, Ohio, they drove on. When they informed the MSP officers who had stopped them that there were carrying fireworks, the officer inspected the cargo and determined that many of the fireworks were "Michigan Class b" under M.C.L. 750.243a(1)(b). In fact, all of he involved fireworks were classified as U.S. DOT Division 1.4g. This fact was indicated in the placards and bill of lading. The transportation of the fireworks complied with all federal regulations.

Snarski and his driver were charged with illegal possession of fireworks and violation of the Michigan Motor Carrier Safety Act. M.C.L. 480.11, et seq. His commercial stock was destroyed without judicial process.

## Argument

### I. THE MICHIGAN CLASSIFICATIONS ARE PREEMPTED.

Michigan utilizes various imprecise descriptions such as "sparklers", "daygo bombs" and "smoke grenades" to attempt to place all fireworks in one of two categories, Class B or Class C. M.C.L. 750.243a. The descriptions were first utilized by the State of Michigan in the earlier part of the 20th century. The descriptions have not been modified in any significant manner since then.

The Department of Transportation regulations utilize six (6) categories for explosives, including fireworks. 49 C.F.R. 173.50. The regulations were promulgated pursuant to the Hazardous Materials Transportation Act. The purposes of the act was two-fold: (a) to protect the public against the risks involved with "all forms of hazardous material transportation," and (b) "to preclude a multiplicity of State and local regulations and the potential for varying as will as conflicting regulations." Senate Report No. 101-449, Hazardous Materials Transportation Uniform Safety Act of 1990, p. 2.

The DOT regulations are based on the potential hazard involved with the transportation and storage of any given type of hazardous materials. The Michigan

classifications are arcane, do not allow for any clear method of classification of many types of fireworks, are not functionally based on any potential hazard of a given item and have ***no consistency whatsoever with the federal regulations.***

'Article VI of the United States Constitution commands that the laws of the United States "shall be the supreme law of the Land; . . . Any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Art. VI, cl. 2. See also *McCulloch v. Maryland,* 4 Wheat 316, 427, 4 L Ed 579 (1819) ("It is the very essence of supremacy, to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments.")' Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540 (2001). Congress may foreclose State action in a particular area by express language. Lorillard Tobacco, 533 U.S. at 540-41 citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

The scope of express preemption "begins with the language of the statute." Lorillard Tobacco, 533 U.S. 542 citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). The analysis is aided by "considering the predecessor pre-emption provision and the circumstances in which the current language was adopted." Lorillard Tobacco, 533 U.S. 542 & 545 (citations omitted).

Under 49 U.S.C. §5125(b)(A) a State law ***"about***. . . the designation, description, and classification of hazardous material" is preempted if it "is not ***substantively the same as a provision"*** of the federal legislation. (emphasis added) Similarly, federal regulations preempt any State law that ***"concerns***. .

designation, description, and classification of hazardous materials." 49 C.F.R. 107.202(a)(1) (emphasis added). ***"'[S]ubstantively the same'*** means that the non-Federal requirement conforms in every significant respect to the Federal requirement. Editorial and other similar ***de minimis changes are permitted."*** 49 C.F.R. 107.202(d) (emphasis added).

The Court has determined that, within the context of preemption law, "concerns" is equivalent to "relating to" and that any state law which "has a connection with or reference to" the subject matter is "relating to" it. Morales v. Transworld Airlines, 504 U.S. 374, 384 (1992) (listing cases). The Court has "repeatedly" observed that the term "relate to"is "broadly worded" and is "clearly expansive." Egelhoff v. Egelhoff, 532 U.S. 141, 146 (2001) quoting New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655 (1995) and citing Morales, *supra.*

Also, the Court looks to the objectives of the federal legislation as well as the "nature of the effect of the state law" on the federal legislation. Egelhoff, 532 U.S. at 147 (2001).

***The intent to preempt classifications, such as the one involved herein, is clear.*** "The original intent of HMTA was to authorize the Department of Transportation (DOT) with the regulatory and enforcement authority to protect the public against the risks imposed by all forms of hazardous materials transportation, ***and to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations."*** Senate Report 101-449, Hazardous Materials Transportation Uniform

Safety Act of 1990, P.L. 101-615, see page 104 Stat. 3244, p. 2 (1990) (emphasis added). "Hazardous materials transportation is an integral component of the Nation's industrial economy." Senate Report 103-217, Hazardous Materials Transportation Authorization Act of 1994 — Trucking Industry Reform Act of 1994, P.L. 103-311, see page 108 State. 1673, p. 1,

> In 1975, Congress enacted the HMTA, which established the primacy of the Department of Transportation (DOT) over the regulation and enforcement of Federal hazmat transportation safety activities. Prior to the enactment of the HMTA, several Federal Government agencies shared regulatory jurisdiction and implemented inconsistent enforcement procedures, ***hindering effective Federal hazmat safety efforts.*** The HMTA broadly defined DOT's regulatory authority, allowed for more comprehensive civil and criminal penalties for violations of regulations, and provided greater conformity among Federal , State and local laws and regulations.

Senate Report 103-217, Hazardous Materials Transportation Authorization Act of 1994 — Trucking Industry Reform Act of 1994, P.L. 103-311, see page 108 State. 1673, p. 2. (1994).

After the enactment of HMTA, the Committee on Commerce, Science, and Transportation requested the Office of Technology Assessment (OTA) to identify areas requiring further legislative attention. The OTA

*specifically identified a need for promulgation of regulations providing more uniformity among Federal, State, and local governments.* In response to this and other concerns, Congress passed the HMTUSA of 1990. Id.

Given the strong preemptive statutory language and legislative history, the Michigan classification scheme is preempted.

## CONCLUSION

WHEREFORE, for all the above reasons, Petitioner prays that the Court grant the writ of certiorari.

Respectfully submitted,

Dated: 11-1-02

Timothy M. Holloway
Attorney for Petitioners

Dated: 11-1-02

Hugh M. Davis, Jr.
Attorney for Petitioners

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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MARK PICKELMAN and RAYMOND SNARKSI,

Plaintiffs, CIVIL ACTION NO. 00-40134

v.

Hon. Paul D. Gadola
U.S. District Court Judge

MICHIGAN STATE POLICE and COLONEL MICHAEL D. ROBINSON, in his official capacity,

Defendants.
_____/.

MEMORANDUM OPINION AND ORDER DISMISSING CIVIL ACTION

Before this Court is Defendants' Motion to Dismiss and for Summary Judgment filed on May 9,2000. Pursuant to Local Rule 7.1(e)(2), this Court has determined that oral argument will not significantly aid in the disposition of this motion. For reasons stated below, this Court will grant the relief sought by

Defendants for reasons other than those raised by Defendants, and this Court will dismiss this civil action.

Factual Background

Plaintiff Mark Pickelman "is a seasonal fireworks merchant in the Western District of Michigan." (First Amended Compl.§ 1.) Plaintiff Raymond Snarski "is a seasonal fireworks Merchant who resides in Macomb County in the Easter District of Michigan." (Id ¶ 2.) Defendant Michigan State Police is a Michigan law enforcement agency with posts throughout the State of Michigan. (Id ¶ 3.) Defendant Colonel Michael D. Robinson "is the Director of Defendant, Michigan State Police, and is sued in his official capacity only." (fl~,. ¶ 4.)

Procedural History

This Court dismissed Plaintiffs' claims for relief without prejudice in Burda Brothers, Inc. v. Walsh, 61 F. Supp. 2d 648 (E.D. Mich. 1999), thereby allowing them to raise their claims for relief against the Michigan State Police in litigation separate from Burda Brothers, Inc. In Burda Brothers, Inc., this Court stated as follows:

. . . plaintiffs seek a declaratory judgment to the effect that the Michigan Fireworks Law is invalid as preempted by federal regulations or unconstitutionally vague. Defendants argue that this court should abstain from deciding the merits of a portion of that claim on the basis of the RookerlFeldman doctrine. The Rooker! Feldman doctrine, "a combination of the abstention and res judicata doctrines, stands for the proposition that a

federal district court may not hear an appeal of a case already litigated in a state court." United States v. Owens, 54 F.3d 271, 273 (6th Cir. 1995). This court must apply the doctrine, and dismiss a claim for lack of subject matter jurisdiction if the party against whom the doctrine is being applied had the opportunity to raise the issue in a prior state court proceeding, and the issue was adjudicated in the prior state court proceeding.

With regard to the Burda Bros., any claim that the fireworks law is preempted by federal regulations is barred by Rooker/Feldrnan. The Michigan Court of Appeals clearly disposed of that issue, Burda Bros. had a full and fair opportunity to litigate the issue in front of the state court and this court may not review the decision of the Michigan Court of Appeals. Accordingly, this court must dismiss the claims by the Burda Bros. plaintiffs that the Michigan Fireworks Laws are preempted by federal regulations. What complicates this matter somewhat is the -addition in this action of Pickelman and Snarski. They have no relation to any of the factual allegations set forth in the complaint that relate to the S 1983 claims. The only claims asserted by Pickelman and Snarski are claims against the Michigan State Police for declaratory relief identical to that sought by the Burda Bros. It appears that they have been added solely for the purpose of allowing the Burda Bros. to advance an argument in front of this court that they would otherwise be unable to , i. e., that the Michigan Court of Appeals erred when it found that the Michigan Fireworks Law is not preempted by federal regulations. This court will not

allow the Burda Bros. plaintiffs to execute an end run around the Rooker/Feldmart doctrine in this manner. Accordingly, this court will dismiss the claims of Pickelman and Snarsjci without prejudice, and allow them to raise these claims in litigation separate from the Burda Brothers.

With regard to the claims of vagueness, the state court did not adjudicate those claims because it found that the statute was preempted. Accordingly, it would appear that Rooker/Feidman would not apply to those claims. However, plaintiffs' claims of vagueness lack merit, and therefore should be dismissed on their merits. The primary basis for plaintiffs' claims of vagueness is the presence in § 750.243a of phrases such as "and other similar devices" (S 750.243a(l) (b); § 750.243a(l) (c)) and "other fireworks of like construction" (S 750.243a(2)(c)). However, a thorough review of the statute indicates that the terms of the statute are more than adequately defined. The fact that the legislature was unable or unwilling to specifically list each and every conceivable kind of firework does not render the statute unconstitutionally vague. Accordingly, this court finds that plaintiffs' claims of vagueness lack merit.

61 F. Supp. 2d at 658-59 (emphasis added).

On March 2, 2000, Plaintiffs filed their "Complaint for Declaratory Relief and' Damages." On March 28, 2000, Plaintiffs filed their First Amended Complaint, which added Colonel Michael D. Robinson, "in his official capacity," as a Defendant. As in the original Complaint

in this civil action, Plaintiffs set forth a single count for declaratory and injunctive relief:

> Plaintiffs respectfully request() that this Honorable Court, after an evidentiary hearing, if necessary, issue an order granting declaratory relief on the validity of and an injunction against the enforcement of the following:
>
> A.
>
> The Michigan fireworks statute MCL 750.243a-d, as preempted by the mandatory federal regulations as to classification, description, packaging, labeling and for all other purposes.
>
> B.
>
> The Michigan fireworks statute, MOL 750.243a(2), as unconstitutionally void for vagueness in that the phrases "other similar devices", "other fireworks of like construction" and "other modern explosives" contained therein do not give the merchant or the consumer adequate notice of what may be sold, possessed, and used in Michigan without a permit.
>
> C.
>
> The restriction of out-of-state sales of consumer fireworks, under MCL 750.243a(3) (g), to only when they are transported by common carrier.
>
> D.
>
> The forfeiture of ordinary

> commercial stock consisting of U.S. DOT Div. 1.4G consumer fireworks seized without warrant, or held under warrant pursuant to MCL 760.655, as being contraband p.~ a or designated by MCL 600.4701.

(First Amended Compl. ¶ 40.)

On May 9, 2000, Defendants filed their Motion to Dismiss and for Summary Judgment. Defendants request that this Court dismiss this civil action pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure or grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

Discussion

1. Standard for exercising discretion to entertain a claim for declaratory judgment

Pursuant to Tile 28, United States Code, Section 1331, federal district courts have subject matter jurisdiction over' a civil action in which a party seeks declaratory and injunctive relief from a state regulation on the ground that such regulation is preempted by a federal statute. See Alitel Tennessee, Inc. v. Tennessee Public Service Commission, 913 F.2d 305, 308 (6th Cir. 1990). Federal courts, however, have discretion to exercise jurisdiction to grant relief under the Declaratory

Judgment Act, 28 U.S.C. §5 2201 and 2202. Wilton v. Seven Falls Co., 515 U.S. 277, 286–88 (1995). The Declaratory Judgment Act "is an enabling Act, which confers discretion on the courts rather than an absolute right upon the litigant." Green v. Mansour, 474 U.S. 64, 72 (1985) (quoting Public Service Commission v. Wycoff Co., 344 U.S. 237, 241 (1952)) According to the United States Court of Appeals for the Sixth Circuit, "[t]he two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Allstate Insurance Co. v. Mercier, 913 F.2d 273, 277 (6th Cir. 1990) (quotation and citation omitted). The Sixth -Circuit explained that "when neither of these results can be accomplished, the court should decline to render the declaration prayed." Id. (quotation and citation omitted)

The Sixth Circuit has enumerated several factors that courts should consider in determining whether to exercise jurisdiction over a declaratory judgment action:

> (1)whether the [declaratory] judgment would settle the controversy; (2) whether the declaratory judgment would serve a useful purpose in

clarifying the legal relations at issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"; (4) whether the use of a declaratory action would increase the friction between our federal and state courts and improperly encroach upon state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective.

Scottsdale Insurance Co. v. Roumoh, 211 F.3d 964, 968 (6th Cir.

2000); see, Allstate Insurance Co., 913 F.2d 273, 277; American Home Assurance Co. v. Evan, 791 F.2d 61, 63 (6th Cir. 1986).

2. Analysis

This Court will exercise its discretion not to entertain this declaratory judgment action according to the criteria and factors adopted by the Sixth Circuit.

a. Whether a declaatory judgment would, settle the controversy

At least two of the legal issues on which Plaintiffs seek a declaratory judgment those raised in Subparagraphs A and B of Paragraph 40 of Plaintiffs' First Amended

Complaint appear to already have been settled by this Court in Burda Brothers, Inc. v. Walsh, 61 F. Supp. 2d 648 (S.D. Mich. 1999), by the Michigan state courts in Sta~os v. City of Lansing, 221 Mich. App. 223, 561 N.W.2d 116 (1997), and by the Supreme Court of the United States when it denied a petition for a writ of certiorari, Stajos v. City of Lansing, ____ U.S. ____, 119 S. Ct. 1455, 143 L. Ed. 2d 542 (1999).

Plaintiffs' counsel here, Hugh H. Davis, Jr. of Constitutional Litigation Associates, P.C., also represented the plaintiffs in Burda Brothers, Inc. — Burda Brothers, Inc., Efim Burda, Elissa Burda, and Plaintiffs here -- and the plaintiff in Stajos – William James Stajos, who was doing business as American Eagle Fireworks, Inc. The relevant portion of this Court's ruling in Burda Brothers, Inc. is quoted above. In Stajos, the Michigan Court of Appeals ruled as follows:

> Plaintiff appeals as of right from an order denying him the relief he sought in this declaratory judgment action. We affirm.
>
> On June 17, 1993, police officers entered one of plaintiff's Lansing business locations and seized certain fireworks pursuant to a search warrant. Six days later, plaintiff filed a complaint seeking injunctive relief and a declaratory judgment. He alleged that he was entitled

> to an injunction to prevent the threat of further seizures, given the impending July 4th fireworks season.

The complaint further asserted that the case arose from-the fact that there are a number of well-defined categories of common fireworks recognized by the United States Department of Transportation (USDOT) that are neither specifically restricted nor specifically allowed by M.C.L. § 750.243a; -N.S.A. § 28.440(1). It was plaintiff's position that a proper reading of this statute allowed the unrestricted sale of the following kinds of fireworks: helicopter type rockets, mines and shells, ground spinners, wheels, illuminating torches, and new and novel items not specifically classified, but approved by USDOT as class C common fireworks. Plaintiff alternatively argued that M.C.L. S 750.243a; N.S.A. § 28.440(1) was preempted by federal regulations or, as a criminal statute, was void for vagueness as it related to the five specifically enumerated categories of federal class C common fireworks.

* * *

Plaintiff . . . argues that M.C.L. § 750.243a; M.S.A.§ 28.440(1) is preempted by various federal regulations. The trial court rejected this claim, finding no conflict between the federal regulations and the statute and no reason to suppose that Congress intended to preempt the states from regulating fireworks sales.

In considering plaintiff's preemption claim, we are cognizant that Congress explicitly may define the extent to which its enactments preempt state law. Schneidewind v.ANR Pineline Co., 485 U.S. 293, 302, 108 5. Ct. 1145, 1151–52, 99 L. Ed.2d 316 (1988). In the absence of an express Congressional command, state law is preempted if that law actually conflicts with federal law or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it. Cipollone v. Liacett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992). Properly promulgated federal regulations may also preempt state statutes J1 re Freedland's Estate, 38 Mich. App. 592, 596, 197 N.W.2d 143 (1972)

The trial court properly rejected plaintiff's preemption claim. There is no preemption because the federal regulations cited by plaintiff address only the packaging and classification of fireworks for interstate shipment and do not address the sale br use of fireworkswithin a state., ~ Colorado Pyrotechnic Ass'n v. Meyer, - -740 F. Supp. 792 CD. Cob. 1990). Further, 18 U.S.C.§ 836 imposes criiminal penalties on a person who knowingly transports fireworks "in a manner or for a use prohibited by the laws of such State specifically prohibiting or regulating the use of fireworks." This provision also indicates that the definitions of

fireworks contained in, the laws of the respective states shall be applied. It is thus apparent that the federal regulations contemplate that states are not preempted from regulating the intrastate sale and use of fireworks.

* * *

Plaintiff also complains that the fireworks statute is unconstitutionally void for vagueness. As recently stated in People v. Lino, 447 Mich. 567, 575– 576, 527 N.W.2d 434 (1994):

> In order to pass constitutional muster, a penal statute must define the criminal offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Vagueness challenges that do not implicate First Amendment freedoms are examined in light of the facts of each particular case. When making a vagueness determination, a court must also take into consideration any judicial constructions of the statute.

Thus, there are at

> least three ways a penal statute may be found unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms. [Citations omitted.)

Plaintiff challenges as being void for vagueness subsections 1(b) and (c), which define "Class B fireworks" and "Class C fireworks" respectively by listing various fireworks types and ending their classification with the phrase "and other similar devices," subsection 2(c), which lists a set of controlled fireworks by type and ends with the phrase "or other fireworks of like construction," and subsection 2 (d), which lists a set of controlled fireworks 'by type and ends with the phrase "or other modern explosives."

When evaluating the vagueness of a statute, this Court will "look to the entire text of the statute to determine whether the requisite certainty exists." People v. Hayes, 421 Mich. 271, 284, 364 N.W.2d 635 (1984). . . . [T)he

Legislature had made the sale, possession, or use, without a permit, of all fireworks not expressly permitted by section 3 a misdemeanor. Therefore, it is not necessary to determine exactly what "other similar devices," "other fireworks of like construction," or "other modern explosives" mean to know what fireworks are prohibited for sale without a permit. Indeed, the "other fireworks of like construction" and "other modern explosives" phrases effect only a partial ban on those fireworks not excepted elsewhere in the statute. These phrases are swallowed up by subsection 2 Cd), which refers to "fireworks containing an explosive or inflammable compound" and ban the use, sale, or possession of all fireworks not permitted elsewhere in the statute. Therefore, any question concerning the alleged vagueness of the language of subsections 2(c) and (d) is moot because the legality of fireworks sales, possession, or use is determined by the "[f)ireworks containing an explosive or inflammable compound" phrase in subsection 2(d), regardless of an activity's disposition under the remainder of subsections 2(c) and (d) We further note that the use of the phrase "other similar devices" in

subsections 1(b) and (c) is only utilized in determining the proper storage of fireworks. M.C.L. § 750.243d(b); M.S.A. § 28.440(4)(b).

In sum, the permitted fireworks are readily discernible from a cursory reading of subsection 3. Thus, we find that M.C.L. § 750.243a; M.S.A. § 28.~~440 (1)~~ provides fair notice of prohibited conduct and does not provide for arbitrary and discriminatory enforcement. As stated by the prosecuting attorney in his brief on appeal, "Although the fireworks statute is not a model of clarity, it passes constitutional muster."

221 Mich. App. at 224-25, 234–38 (footnotes omitted). The Michigan Court of Appeals noted, however, that, "Sections 243b, 243c and 243d, M.C.L. §750.243b, 750.243c, 750.243d; - M.S.A. § 28.440(2), 28.440(3), 28.440(4), are other exceptions that are not expressly relevant to this appeal." Stabs, 221 Mich. App. at 237 n6.

Nevertheless, in Burda Brothers, Inc., this Court considered and dismissed as without merit the same challenge to Section

750.243a–d presented here. 61 F. Supp. 2d at 659.

The Supreme Court of Michigan' denied leave to appeal the opinion the Michigan Court of Appeals: Stabs v. City of Lansing, 459 Mich. 851, 594 N.W.2d-589 (1998). The Supreme Court of Michigan also denied a motion for rebonsideration of its order denying leave to appeal the opinion of the Michigan Court of Appeals. Statios v. City of Lansing, 459 Mich. 851, 587 N.W.2d 500 (1998) . The Supreme Court of the United States denied a petition for a writ of certiorari to review the opinion of the Michigan Court of Appeals. Stajos v. City of Lansing, ____ U.S. ____, 119 S. Ct. 1455, 143 L. Ed. 2d 542 (1999). In short, the plaintiff in Stabos exhausted his appeals on this issue through the state courts and to the Supreme Court of the United States. Now, Plaintiffs' counsel is attempting to bring the same issues before the federal district court, which this Court considers to be inappropriate.

b. Whether a declaratory judgment would serve a useful purpose in clarifying the legal relations at issue

In light of the history of the litigation of the legal

issues before this Court, the Michigan state courts, and the Supreme Court

of the United States, this declaratory judgment action would hot serve a useful purpose in clarifying the legal relations at issue. The Michigan state courts are more than fully capable of resolving any unresolved state-law-based legal relations between the parties, namely those raised in Subparagraphs C and D of Paragraph 40 of Plaintiffs' First Amended Complaint.

c. Whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or "to provide an arena for a race for res judicata"

While Plaintiffs' request for a declaratory judgment does not appear to be merely "procedural fencing" or a "race for res," Plaintiffs here do appear to be using the Declaratory Judgment Act as a means of appealing to this Court a state court ruling albeit one involving a different plaintiff - on which appeals have been exhausted. As this Court observed in Burda Brothers, Inc., Plaintiffs' counsel appears to be attempting to execute another kind of end run around the various

abstention doctrines – including the Rooker/Feldman doctrine cited by this Court in Burda Brothers, Inc., 61 F. Supp. 2d at 658–59 -- that prevent review of state court ruling in federal court. Certainly, if William James Stajos or American Eagle Fireworks, Inc. were the plaintiffs in this civil action, this Court would not entertain a declaratory judgment action under the RookerlFeldman doctrine. Plaintiffs' counsel simply has substituted one plaintiff for two other similarly situated plaintiffs. This Court does not find old wine in new wineskins to be any more palatable.

d. Whether the use of a declaratory action would increase the friction between federal and state courts and improperly encroach upon state jurisdiction

Permitting Plaintiffs to maintain a declaratory action in this Court may encroach upon the Michigan state courts' jurisdiction and certainly would increase friction between federal and state courts in Michigan when such friction is at a recent high. ~g People v. Puertas, ____ Mich. ____, ____ N.W.2d ____, 2000 Mich. LEXIS 1194

(June 20, 2000). In American Home, the Sixth Circuit worried aloud: "We question the need for federal courts to issue declaratory judgments in such cases where a state court has already accepted jurisdiction over the subject matter of the lawsuit." American Home, 791 F.2d at 63. Even though this case presents different plaintiffs than in Stabs, sortie of the legal issues have been adequately resolved by this Court and the Michigan state courts as discussed above, and the remaining state-law-based legal issues in Subparagraphs C and U of Paragraph 40 of Plaintiffs' First Amended Complaint can be adequately resolved in the Michigan state courts.

e. Whether there is an alternative remedy which is better or more effective

A non-declaratory action brought in state court or federal court which does not raise legal issues already resolved by this Court or the Michigan state courts would provide a better and more effective remedy for the reasons stated above.

Because exercising jurisdiction over this declaratory action would not serve a useful purpose in clarifying and settling the

legal relations in issue, and because the instant-action may not as effectively terminate and afford relief from whatever uncertainty, insecurity, or controversy that gave rise to this proceeding, this Court declines to exercise jurisdiction over this civil action and will grant Defendants' motion by dismissing Plaintiffs' civil action without prejudice.

Conclusion

Accordingly, this Court being fully advised in the premises,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss and for Summary Judgment [Docket Entry 5] is GRANTED.

IT IS FURTHER ORDERED that this civil action is DISMISSED.

IT IS FURTHER ORDERED that if Plaintiffs' counsel files any civil action in the United States District Court for the Eastern District of Michigan or the United States District Court for the Western District of Michigan that asserts claims for relief that are the same as or •related to those raised in the instant civil action, then counsel shall attach a

copy of this Memorandum Opinion and Order to the initial pleading.

SO ORDERED. Dated: [June 30, 2000]

/s/___
Honorable Paul V. Gadola
United States District Judge

NOT RECOMMENDED FOR FULL-TEXT PUBUCATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 22, 2002
LEONARD GREEN, Clerk

Mark PICKELMAN and Raymond SNARSKI,
Plaintiffs-Appellants,
V.
MICHIGAN STATE POLICE and Colonel Michael D. Robinson, in his official capacity,

Defendants-Appellees.

BEFORE:
SILER and COLE, Circuit Judges;
STAFFORD*, District Judge

R. GUY COLE, JR., Circuit Judge. Plaintiffs-Appellants Mark Pickelman and Raymond Snarski appeal the dismissal of this declaratory judgment action, assigning as error the district court's decision to decline to grant declaratory relief on the basis that Michigan's fireworks statute, Mich. Comp. Laws §750.243 ("Fireworks Statute"), is unconstitutional. Plaintiffs are fireworks vendors whose fireworks were confiscated by defendants pursuant to Michigan's

Fireworks Statute. They contest this confiscation by claiming that the Fireworks Statute is (1) preempted by federal Department of Transportation regulations ("D.O.T. regulations"); and (2) unconstitutionally vague. For the reasons discussed below, we AFFIRM the decision of the district court.

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* The Honorable William stafford, United States District Judge for the Northern District of Florida, sitting by designation.

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Background

A.

Plaintiffs Mark Pickelman and Raymond Snarski(collectively, "plaintiffs") are seasonal fireworks merchants in Michigan. On or around July 1, 1998, Michigan State police officers seized numerous fireworks from Pickelman's fireworks stand, pursuant to Mich. Comp. Laws. § 750.243a-b, which prohibit the sale of certain "Class B" fireworks without a validpermit. The confiscated fireworks, according to a letter sent to Pickelman from the district attorney, would not be returned to Pickelman and would likely be destroyed.

Similarly, on or around June 24, 1998, Snarski was stopped by Michigan State police officers in Monroe County, Michigan while en route from Ohio, where he had purchased fireworks from a wholesaler, to Macomb County, MI, where he resides. Upon inspection of Snarski's cargo, the officers discovered

and subsequently seized Class B fireworks as proscribed by Mich. Comp. Laws § 750.243a. The police officers charged Snarski with illegal possession of fireworks and later told him that the seized fireworks had been destroyed.

B.

Plaintiffs originally joined a complaint filed by two fireworks retailers, Efim and Elissa Burda ("the Burda Plaintiffs"), who claimed that Michigan's Fireworks Statute is preempted by federal regulations and is unconstitutionally vague. *See Burda Bros., Inc. v. Walsh,* 61 F.Supp.2d 648 (E.D. Mich. 1999), affd 2001 WL 1254808 (6th Cu. Oct. 12, 2001). However, because the Burda Plaintiffs had previously raised a preemption claim in the Michigan Court of Appeals, the court determined that they were barred from raising this claim again in federal court under the Rooker/Feidman doctrine. *Id. at 659* ("The Michigan Court of Appeals clearly disposed of *that issue,* The Burda Brothers bad *a* ±1111 and fair opportunity *to* litigate the issue in front of the state court, and this court may not review the decision of the Michigan Court of Appeals."). The Burda court did consider the Burda plaintiffs vagueness claim on the merits. In order to accord the Pickelman plaintiffs the opportunity to litigate all of their claims, including their preemption claim, the court dismissed the plaintiffs' complaint without prejudice, and allowed them to pursue their claims in litigation separate from the Burda Brothers.

Plaintiffs subsequently filed *a* separate complaint, which again sought declaratory relief. In

that complaint, plaintiffs claimed that: (1) the Fireworks Statute *is* preempted by federal regulations regarding the classification and transportation of fireworks; (2) the Fireworks Statute is unconstitutionally vague as to the exact types of fireworks that are prohibited; (3) the Fireworks Statute's provision exempting from prosecution "the sale of fireworks, provided they are to be shipped directly out of state pursuant to the regulations of the United States Department of Transportation. . ." should not be limited to such transport conducted by common carrier; and (4) the defendants' confiscation and subsequent destruction of their fireworks was unlawful. The district court declined to exercise jurisdiction over plaintiffs' claims, concluding that declaratory judgment was unnecessary, as the Michigan courts have previously upheld portions of the statute against preemption and vagueness claims and those remaining issues would be best dealt with by the Michigan courts.

On appeal, plaintiffs challenge only the district court's determination of the preemption and vagueness claims. Plaintiffs also allege that: (1) the Fireworks Statute creates a burden on interstate commerce; and (2) the seizure of their fireworks violates the Fourth, Fifth, and Fourteenth Amendments of the Constitution.

## Standard of Review

A district court's decision to exercise jurisdiction under the Declaratory Judgment Act, 28 U.S.C. § 2201(a) ("the DJA"), is reviewed for abuse of discretion. *See Wilton v. Seven Falls Co., 515* U.S. 277,289-90(1995) ("[Dj]istrict courts' decisions aboutthe

propriety of hearing declaratory judgment actions, which are necessarily bound up with their decisions about the propriety of granting declaratory relief, should be reviewed for abuse of discretion."); *Scottsdale Ins. Co. v. Roumph,* 211 F.3d *964, 967 (6th* Cir. 2000). A district court is considered to have abused its discretion under the DJA where it relies upon a clearly erroneous fmding of fact, improperly applies the law, or employs an erroneous legal standard. *See Southward v. South Central Ready Mix Supply Corp., 7* F.3d 487, 492 (6thCir. 1993).

Discussion

Michigan's Fireworks Statute regulates the use, sale, possession and storage of fireworks in Michigan. *See* Mich. Comp. Laws § 750.243(a)-(d). The Fireworks Statute delineates two categories of fireworks: Class B fireworks, which consist of the more potent variety of fireworks that are prohibited without permit, and Class C fireworks, for which a permit is generally not required. *See* Mich. Comp. Laws § 750.243a(1)(b)-(c). The Fireworks Statute makes it unlawful for individuals and businesses to "offer for sale, expose for sale, sell at retail, keep with intent to sell at retail, possess, give, furnish, transport, use, explode or cause to explode. . ." various types of fireworks, including "fireworks containing an explosive or inflammable compound or a tablet or other device commonly used and sold as fireworks containing nitrates, fulminates, chiorates, oxalates, sulphides of lead, barium, antimony, arsenic, mercury, nitroglycerine, phosphorous, or a compound containing these or other

modern explosives." Mich. Comp. Laws § 750.243a(2)(d). There are a limited number of exceptions to this prohibition. In particular, an individual can lawfully sell fireworks if heeither obtains the necessary permit under Mich. Comp. Laws § 750.243b or if the fireworks "are to be shipped directly out of state pursuant to the regulations of the United States department of transportation covering the transportation of explosives and other dangerous articles by motor, rail, and water." Mich. Comp. Laws § 750.243a(3)(g). The Fireworks Statute also lists a number of harmless fireworks that can be sold or used without a permit. *See* Mich. Comp. Laws § 750.243a(3)(a)-(e).

In determining whether plaintiffs are entitled to declaratory relief on the basis that the statute is unconstitutional, a district court must consider: (1) whether the judgment would settle the controversy; (2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations *at* issue; (3) whether the declaratory remedy is being used merely for the purpose of "procedural fencing" or to provide an arena for a race for res judicata; (4) whether the use of a declaratory action would increase the friction between state and federal courts by encroaching upon state jurisdiction; and (5) whether there is an alternative remedy that is better or more effective. *See Scottsdale Ins. Co. v. Roumph,* 211 F.3d 964,968 (6th Cir. 2000). We now evaluate the preemption and vagueness challenges against this standard.

A. Preemption Claim

A federal law or regulation preempts a state law under three different circumstances. *See English v. Gen. Elec. Co.,* 496 U.S. 72, 78-79 (1990). First, Congress can define explicitly the extent *to* which a specific federal law preempts state law. *See Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95-98 (1983). Second, "in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field Congress intended the Federal Government to occupy exclusively." *English, 496* U.S. at 79. Third, a state law is preempted "where it is impossible for a private party to comply with both state and federal requirements." *Id.*

Plaintiffs assert that the Fireworks Statute is preempted by D.O.T. regulations regarding the transport of hazardous materials. In particular, plaintiffs point to 49 U.S.C. § 5101, Transportation of Hazardous Materials, which delineates certain standards for transporting hazardous materials, including fireworks, in interstate commerce. *See* 49 U.S.C. § 5102(1)(A)-(B) ("In this chapter 'commerce' means trade or transportation in the jurisdiction of the United States between a place in a State and a place outside of the State; or that affects trade or transportation between a place in a State and a place outside of the State."). Those D.O.T. regulations include a classification scheme for hazardous materials. *See, e.g.,* 49 U.S.C.§ 5108. The regulations also explicitly call for the preemption of analogous state statutes that vary substantively from the federal scheme. *See* 49 U.S.C. § 5125(b)(l) ("a law, regulation, order, or other requirement of a State . . . that is not substantively the same as a provision of this chapter or a regulation prescribed under this chapter is preempted."). Plaintiffs

argue that because the Fireworks Statute possesses *a* classification scheme that varies from the federal classification scheme, the state statute is preempted.

The district court was not persuaded by plaintiff's argument. The court aptly noted that while the D.O.T. regulations call for the preemption of dissimilar state statutes, those regulations are limited to the transport of fireworks in interstate commerce. The Fireworks Statute contemplates the existence of these regulations and is applicable only to the use, sale, transport, and storage of fireworks in intrastate commerce. *See* Mich. Comp. Laws § 750.243a(3)(g) (exempting the sale of fireworks, "provided that they are to be shipped directly out of state pursuant to regulations of the United States department of transportation covering the transportation of explosives... "). *See also Stajos v. City of Lansing,* 561 N.W. 2d 116, 122 (Mich. Ct. App. 1997) ("{i]t is. . . apparent that the federal regulations contemplate that states are not preempted from regulating the intrastate sale and use of fireworks."). Because the D.O.T. regulations and the Fireworks Statute regulate different arenas of commerce, they are not in conflict. For that reason, the district court did not abuse its discretion in declining to exercise jurisdiction over this claim.

B. Vagueness

A statute is unconstitutionally vague in violation of the Due Process Clause "if it isso vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is

prohibited and what is not in each particular case." *Giaccio v. State of Pa.*, 382 U.S. 399, 402 (1966). *See also United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg '1. TransitAuth.*, 163 F.3d 341,358-59 (6th Cir. 1998) ("Due process requires that we hold a state enactment void for vagueness if its prohibitive terms are not clearly defined such that *a* person of ordinary intelligence can readily identify the applicable standard for inclusion and exclusion.").

Plaintiffs argue that the Fireworks Statute is vague because it does not explicitly include every sort of firework or explosive material that is actually prohibited under the statute. *See, eg.*, Mich. Comp. Laws § 750.243a(2)(d) (prohibiting fireworks containing various enumerated chemicals "or a compound containing these or other modem explosives."). However, the absence of a comprehensive list of all possible proscribed fireworks does not a vague statute make. The inclusion of broad language such as "fireworks of like construction" and "a compound containing these or other modem explosiyes" merely indicates that the Michigan legislature intended the class of prohibited fireworks to be broad. The intended broad sweep of the statute is bolstered by the legislature's inclusion of limited exceptions for virtually harmless fireworks. *See Detroit Edison Co. v. Sec. & Exch. Comm*, 119 F.2d 730, 739 (6th Cir. 1941) ("[E]xceptions in statutes must be strictly construed and limited to objects fairly within their terms, since they are intended to restrain or except that which would otherwise be within the scope of the general

language.").

A number of courts, including the Sixth Circuit, have upheld the Fireworks Statute against claims of vagueness on the grounds that it is broad rather than vague. *See Stajos, 561* N.W.2d at 120 (holding that "{a fair review of the fireworks statute reveals a general prohibition coupled with certain limited exceptions," which is not vague); *see also Burda Bros. v. Walsh,* 2001 WL 1254808, at *9 (6th Cir. Oct. 12, 2001) (per curiam) ("{wje agree with the district court that the Michigan fireworks statute, as interpreted by the Michigan courts, is not void on the grounds of vagueness."). Given the language of the Fireworks Statute and other courts' treatment of it, the district court acted within its discretion in declining to exercise jurisdiction over the plaintiffs' vagueness claim.

C. Burden on Interstate Commerce and Unconstitutional Seizure of Fireworks

On appeal, plaintiffs have added two constitutional claims. First, plaintifts claim that the Fireworks Statute as applied to them constitutes an unconstitutional burden on interstate commerce. They further allege that the defendants seized and destroyed their fireworks in violation of the Fourth, Fifth, and Fourteenth Amendments. However, because these claims were not presented before the district court, they have been improperly raised here. "The court is not compelled to hear, nor should it hear, an issue not presented to the district court unless reaching that issue serves an overarching purpose beyond that of arriving at the correct result in an individual case." *Foster v. Barilow,* 6 F.3d 405, 408 (6th Cir. 1993). There is nothing in the record to suggest that our consideration of these issues now would have any impending significance beyond the litigants here. Regardless, we are ill-equipped to address those challenges because the record below is not developed in those areas and lacks crucial facts needed to determine these claims. Therefore, we do not reach these claims in rendering our decision.

Conclusion

For the foregoing reasons, the judgment of the district court shall be AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
JUN 05 2002
LEONARD GREEN, CLERK

Mark PICKELMAN and Raymond SNARSKI,
Plaintiffs-Appellants

V.

MICHIGAN STATE POLICE and Colonel
Michael D. Robinson, in his official
capacity,

Defendants-Appellees.

BEFORE:
SILER and COLE, Circuit Judges; STAFFORD*, District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully consicered uopn the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/
Leonard Green, Clerk

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* Hon. William Stafford, United States District Judge for the Northern District of Florida, sitting by designation.